

CITY OF BELLEVUE
CITY COUNCIL

Summary Minutes of Regular Session

March 3, 2003
8:00 p.m.

Council Chambers
Bellevue, Washington

PRESENT: Mayor Marshall, Deputy Mayor Degginger, and Councilmembers Davidson, Lee, Mosher, and Noble

ABSENT: Councilmember Creighton

1. Call to Order

The meeting was called to order at 8:06 p.m. by Mayor Marshall, who presided.

2. Roll Call, Flag Salute

Upon roll call by the City Clerk, all Councilmembers except Mr. Creighton were present. Mr. Lee led the flag salute.

(a) Proclamation of Red Cross Month

Mayor Marshall read a proclamation designating March as Red Cross Month in Bellevue. Cherie Ohlson, a member of the local Red Cross Board of Directors, thanked Council for its support. Mayor Marshall thanked all of the Red Cross volunteers in our community.

3. Communications: Written and Oral

- (a) Rick Collette, President of Bellevue Art Museum's Board of Trustees, thanked Council for its commitment four years ago to consider a payment from the Development Services Fund. The payment will qualify for a fifty percent match from a private funding source and therefore have a positive impact on the museum's current financial situation.

4. Reports of Community Councils, Boards and Commissions: None.

5. Report of the City Manager

(a) ICMA Publication Recognizes City of Bellevue

City Manager Steve Sarkozy announced that the International City and County Management Association (ICMA) has recognized work by the City of Bellevue in a new publication, *What Works: Management Applications of Performance Measurement in Local Government*.

(b) Response to Request by Auto Dealers

In response to a request for temporary sign code exemptions by Bellevue auto dealers last week, Mr. Sarkozy asked staff to provide an update. Planning and Community Development Director Matt Terry noted the management brief in the Council packet summarizing the City's response. He said the City's special event program and right-of-way use permit process could facilitate some of the requested activities for future sales events. City staff met with the auto dealers to discuss the request and response.

In response to Councilmember Mosher, Economic Development Project Manager Ellen Miller-Wolfe said auto dealers are participating in focus groups related to the Wilburton NE 8th Corridor Study. Mr. Lee asked whether the March sales event could be helped through the City's special event program.

Responding to Mayor Marshall, Ms. Miller-Wolfe said auto dealers chose to schedule a meeting with staff on March 6 to discuss desired long-term sign code revisions. The auto dealers are also interested in considering right-of-way closure options for future events. Mayor Marshall thanked staff for their work and encouraged a fair and equitable approach to the issue.

Mr. Terry said City staff are sensitive to auto dealers' needs, particularly within the current economic environment, and are working to find ways to help support the auto dealers. He noted that similar requests are received regularly from local businesses and confirmed the importance of treating all business equally and fairly.

Mr. Noble does not want the City's sign code ordinance to be so restrictive as to negatively affect a business owner's ability to attract customers. He looks forward to hearing input from the auto dealers about potential sign code revisions.

(c) Sidewalks along Tech Tower Project

Mr. Sarkozy recalled a public comment received during the February 3 Regular Session asking the City to investigate the restoration of sidewalks along the delayed Tech Tower project (NE 4th Street and 108th Avenue NE). He said the issue is complicated due to bankruptcy proceedings, but the City is working with the contractor and owner to remove office sheds located on 108th by March 15 and to restore sidewalks on NE 4th Street.

(d) New Finance Director

Mr. Sarkozy introduced Jan Hawn, Bellevue's new Finance Director with 22 years of experience in public finance. She is one of only 200 professionals to be designated a Certified Public

Finance Officer by the Government Finance Officers Association of America.

(e) Consent Calendar

Mr. Sarkozy suggested pulling item 8(d) regarding Bellevue Art Museum to allow for an expanded description and postponing item 8(f) to allow additional staff work.

6. Council Business

Mr. Mosher attended the Association of Washington Cities (AWC) Legislative Action Conference and Bellevue Youth Link's Gumbo Night.

Mr. Lee attended a meeting of the King County Economic Development Council.

Deputy Mayor Degginger attended Bellevue Youth Link's Gumbo Night, the Planning Commission meeting in which wireless telecommunication facilities were discussed, and a regional town hall meeting. He attended meetings of the Cascade Water Alliance and Lakemont Highlands Homeowners Association.

Dr. Davidson attended Bellevue Youth Link's Gumbo Night and meetings of the Cascade Water Alliance, Regional Water Quality Committee, and WRIA 8 Steering Committee.

Mayor Marshall and Mr. Degginger participated in opening ceremonies for the new interchange at SE 8th Street, the City's first joint project with the Washington State Department of Transportation (WSDOT) and Sound Transit. The project was completed within budget and earlier than anticipated. Mayor Marshall attended two recent functions at North Bellevue Senior Center.

7. Approval of the Agenda

➡ Deputy Mayor Degginger moved to approve the agenda, and Mr. Mosher seconded the motion.

➡ The motion to approve the agenda carried by a vote of 6-0.

8. Consent Calendar

Mayor Marshall clarified the list of items pulled and postponed from Consent Calendar approval.

➡ Mr. Degginger moved to approve the Consent Calendar, as amended, and Dr. Davidson seconded the motion.

➡ The motion to approve the amended Consent Calendar carried by a vote of 6-0, and the following items were approved:

- (a) Minutes of February 18, 2003 Study Session
Minutes of February 18, 2003 Regular Session
- (b) Motion to approve payment of claims for the period ending February 25, 2003, and payroll for the period February 1 through February 15, 2003.
- (e) Resolution No. 6821 adopting the Federal Legislative Agenda for the 2003 legislative session. *(This item was reviewed at the February 24 Extended Study Session.)*
- (i) Resolution No. 6824 authorizing the execution of a consultant agreement with Jacobs Civil, Inc. for professional engineering services for construction support for the NE 29th Connection project in an amount not to exceed \$175,000. (CIP Plan No. PW-R-60)

Item Postponed:

- (f) Resolution No. 6822 authorizing the write-off of 20 uncollectible accounts totaling \$23,297.47.

Items for Council Discussion:

- (c) Revised Ordinance No. 5437 providing for the submission to the qualified electors of the City of Bellevue at an election to be held on May 20, 2003, of a proposition to change the classification of the City under Revised Code of Washington Title 35A to a charter code city classification governed in accordance with a charter, and creating a charter commission consisting of fifteen (15) freeholders elected by the voters to study and draft a charter for consideration by the voters at a subsequent election; requesting the King County Department of Records and Elections to provide a voters pamphlet; and providing that the expenses of conducting the election by mailed ballot and of the voters pamphlet be paid by the City.

Mayor Marshall noted this item was pulled at Councilmember Lee's request. She explained that Ordinance No. 5437 was revised because the City Attorney advised the ordinance must specify that the 15 freeholders will appear in the voters pamphlet. The revised ordinance is provided in Council's desk packet.

Mr. Lee said he pulled the item to highlight this important issue. He is concerned the community will not have sufficient time to properly consider the initiative. Mr. Lee encouraged residents to learn about the full impacts of the charter initiative.

➡ Deputy Mayor Degginger moved to adopt revised Ordinance No. 5437, as provided in Council's desk packet, and Mr. Mosher seconded the motion.

➡ The motion to adopt revised Ordinance No. 5437 carried by a vote of 6-0.

- (d) Resolution No. 6820 authorizing the execution of an agreement with the Bellevue Art Museum implementing the transfer of funding from the City to the Museum approved in the City's 2001-2002 Operating Budget.

Mr. Sarkozy provided further explanation on this agenda item and recalled that \$250,000 was allocated by Council to Bellevue Art Museum in the City's 2001-2002 Operating Budget. This was to be allocated to the museum's Endowment Fund. Due to the downturn in the economy, BAM is unable to proceed with the Endowment Fund at this time but plans to do so within the next four years. BAM is asking the City to proceed with allocating \$250,000 toward the museum's general operating fund, which will serve as a matching fund for additional donations. Mr. Sarkozy feels the request is consistent with Council's original support for this item.

- ➡ Mr. Lee moved to approve Resolution No. 6820, and Mr. Noble seconded the motion.

Mr. Lee feels this funding is consistent with the City's goal to encourage cultural programs and educational opportunities.

- ➡ The motion to approve Resolution No. 6820 carried by a vote of 6-0.

- (g) Resolution No. 6823 authorizing the execution of a professional services agreement with ARC Architects for architectural, engineering, and site design services to construct the South Bellevue Community Center and improvements to Eastgate Park in an amount not to exceed \$920,000. (CIP Plan No. P-AD-61)

Parks and Community Services Director Patrick Foran explained that a higher level of errors and omissions insurance coverage for the Eastgate Park and South Bellevue Community Center project has been recommended. The estimated cost of additional coverage is \$8,000 to \$20,000. Mr. Foran asked Council to consider approving an amount not to exceed \$940,000 for the project.

Deputy Mayor Degginger feels sufficient justification has not been made to support the requested increase. Dr. Davidson concurred.

- ➡ Deputy Mayor Degginger moved to postpone action on item 8(g), and Mr. Mosher seconded the motion.

- ➡ The motion to postpone action on item 8(g) carried by a vote of 6-0.

- (h) Motion to award Bid No. 0306 for Neighborhood Enhancement Program-sponsored installation of new sidewalk on the north side of SE 34th Street between 168th Place SE and West Lake Sammamish Parkway in the *recently annexed West Lake Sammamish area* in the amount of \$95,371 to SLM Construction, as low bidder. (CIP Plan Nos. NEP-1 and PW-W/B-56)

Mayor Marshall noted the award of Bid No. 0306 will provide sidewalks on the north side of SE 34th Street between 168th Place SE and West Lake Sammamish Parkway in a recently annexed

area of the city. She recalled Council's promise to provide improvements in this neighborhood and subsequent recent projects including forest management activities, speed monitoring signs, and the new sidewalk.

➡ Deputy Mayor Degginger moved to award Bid No. 0306, and Mr. Noble seconded the motion.

➡ The motion to award Bid No. 0306 carried by a vote of 6-0.

- (j) Resolution No. 6825 authorizing the execution of a settlement agreement with Mid-Mountain Contractors for payment of a statutory settlement demand in the amount of \$398,064.13 in exchange for a release and dismissal of the lawsuit known as Mid-Mountain v. City of Bellevue, King County Superior Court No. 02-2-26499-9 (SEA).

Mayor Marshall asked staff to clarify the implications of Resolution No. 6825.

City Attorney Richard Andrews said the settlement relates to work completed on SE Newport Way by Mid-Mountain to widen the roadway and disagreements about whether or not Mid-Mountain had completed the work in accordance with the contract. The City withheld final payment until the dispute could be resolved. Mid-Mountain then filed a claim for a larger sum, and the City acknowledged owing money but not the amount claimed by Mid-Mountain. Mid-Mountain alleged the City was responsible for project delays, while the City maintained that delays occurred because Mid-Mountain had to correct work that had not been completed properly. Following a lengthy mediation process, Mid-Mountain filed suit against the City. The settlement is a result of the City's analysis of Mid-Mountain's claim and an assessment of the portions of the claim that the City acknowledges were due to changes or other activities on the part of the City as opposed to items in which Mid-Mountain was responsible.

Mayor Marshall said City staff members have been working hard to resolve this matter. She noted repeated citizen complaints to the Police Department regarding traffic delays of up to 25 minutes, non-responsiveness to citizen concerns or claims (e.g., driveway conditions resulting in car damage), dumping gravel down a storm drain, and contractor damage to newly installed concrete curbs. When the City asked the contractor to repair the curbs, the contractor completed the repairs and then billed the City again for the work. Mrs. Marshall said City staff have been good stewards of public funds while looking out for residents negatively affected by the project.

➡ Deputy Mayor Degginger moved to approve Resolution No. 6825, and Mr. Mosher seconded the motion.

➡ The motion to approve Resolution No. 6825 carried by a vote of 6-0.

9. Public Hearings

- (a) Limited public hearing on the appeal by Rodney Bonebright, et al, regarding the latecomer assessments formulated by the Transportation Department for

infrastructure improvements initially constructed by Gold Creek Homes. (File No. AAD 02-234)

(NOTE: Presentation of oral arguments is: 1) confined to the recommendation of the Hearing Examiner that the matter be remanded to the Transportation Department for development of a new assessment methodology, and 2) limited by Council Rules to 15 minutes for the applicant/appellant and 15 minutes for the respondent on the remanded issue only.)

Mr. Sarkozy introduced the public hearing regarding latecomer assessments for infrastructure improvements associated with Gold Creek Homes on Cougar Mountain.

City Attorney Richard Andrews said this is a limited public appeal hearing on the appeal of Rodney Bonebright and others regarding proposed road improvement latecomer assessments. The matter is before City Council on the recommendation of the Hearing Examiner that it be remanded to the Transportation Department for the purpose of revising the assessment methodology for affected properties. The Hearing Examiner recommends a special benefits analysis incorporating before and after values of the properties within the assessment area.

This limited public appeal hearing is limited to the issues raised by the recommendation of the Hearing Examiner and confined to the record made before the Hearing Examiner. Only parties to the appeal and their representatives may participate in this hearing. Parties to the appeal are Gold Creek Homes, the proponent of the latecomer agreement, and the Transportation Department Director, who together are the appellants, and Rodney Bonebright and other property owners, who are the respondents. The parties will have the opportunity to present oral arguments based on the Hearing Examiner's record. The appellants will proceed first and will have a total of fifteen minutes for their argument. If they wish to do so, they may reserve a portion of that time to be used for rebuttal argument. The respondents will have a total of fifteen minutes to present their arguments. The appellants may then argue in rebuttal if time was reserved for that purpose.

The City Council may ask questions of any party, of staff, or of any other person about any matter contained in the record. New material not contained in the record may not be presented. After all argument is presented and Council has asked any questions it may have, the Council will have the opportunity to deliberate and render a decision.

If the Council determines that the appellants have produced sufficient evidence to support the conclusion that there is an error or defect in the proceedings, and/or that the Hearing Examiner's recommendation is not supported by a preponderance of the evidence, Council may: 1) remand the matter to the Hearing Examiner to conduct a hearing on the merits and make a recommendation as to the proposed latecomer assessments, or 2) modify the recommendation and remand the matter to the Transportation Department with direction as to how to proceed, or 3) continue the hearing to a later date and request further staff analysis prior to making a final decision on the recommendation.

If the Council finds no error or defect in the proceedings nor any factual basis for remanding the matter to the Hearing Examiner, it may accept the recommendation and remand the matter to the Transportation Department

Chris Dreaney, Development Review Manager, provided a brief history on the project. The Cougar Ridge East preliminary plat was approved in January 2001 and engineering improvements were approved in May 2001. Transportation Department staff were approached by Gold Creek representatives in February 2002 asking the City to establish a reimbursement area and assessment and to enter into a reimbursement contract with Gold Creek for the construction of road improvements to 166th Way SE. The improvements were constructed in conjunction with the development of the Cougar Ridge East plat. Staff discussed the request with Council in July 2002. On August 5, Council adopted Ordinance No. 5405 authorizing and providing for the City to enter into assessment reimbursement contracts and establishing procedures for the recovery of City costs. Council also adopted Ordinance No. 5406 authorizing the Hearing Examiner to conduct hearings and make a recommendation for City Council.

Staff mailed notice to owners of affected properties along 166th Way SE, which advised that Gold Creek Homes had requested a reimbursement contract. It notified property owners of their right to request a public hearing by filing a written request within 20 days. Most of the property owners filed a request and a pre-hearing conference was held on September 11 to clarify procedures and issues. On September 17, the Hearing Examiner issued a pre-hearing order setting a hearing date of November 19. On November 6, the Hearing Examiner issued an order on motions for summary judgment, canceling the November 19 hearing and recommending that City Council remand the assessment proposal to the Transportation Department for revision of the assessments using a special benefit analysis.

Ms. Dreaney clarified information presented in the Council packet on this matter. She noted that the map on page 9-6 was created by the City in July 2002. Gold Creek subsequently adjusted the assessment amounts as shown on page 9-7. For purposes of this hearing, City staff updated the map to reflect the adjusted assessment amounts, as shown on page 9-17 of the packet.

➡ Mr. Noble moved to open the limited public hearing, and Mr. Mosher seconded the motion.

➡ The motion to open the limited public hearing carried by a vote of 6-0.

Appellant's Argument:

Brent Carson, Buck & Gordon, spoke on behalf of Gold Creek Homes, the applicant of the latecomers agreement, and noted he would like to reserve two minutes for rebuttal. He asked that attachments 5 and 6 submitted by Ms. Martin be stricken as they are not part of the Hearing Examiner's record.

Mr. Carson said Council's role is to act as judges and to interpret City Code and applicable statutes. The Hearing Examiner equated latecomers assessments with LIDs (local improvement districts) and said there should be a special benefit study before assessments could be imposed.

Mr. Carson said the appellants respectfully disagree and that the Hearing Examiner made an error of law. He said a special benefit study is not needed for a road latecomers agreement because it is not an LID.

Mr. Carson referred to Bellevue City Code regarding utility latecomer agreements. Section 24.02.150 says a property owner may request a latecomers agreement if the owner constructs a public water facility that benefits property in addition to the owner's property. It further states that the utility will determine which properties benefited from public water facilities and should be subject to the latecomers assessment. Mr. Carson asked Council to keep these provisions in mind tonight as they discuss the issue of road assessments.

Mr. Carson noted that he used the new interchange ramp at SE 8th Street today to reach City Hall, although his law firm was not charged for the improvement. He said improvements completed under a LID require a decision by the City to assess properties on the basis of an increased property value. However under a latecomers agreement, the purpose is to relieve a property owner of an obligation. Mr. Carson cited City Code Section 14.60.110, which states that certain property owners must provide frontage improvements. If someone else has completed the improvements for them, a property owner should provide reimbursement under a latecomers agreement when they decide to develop their property because the obligation of frontage improvements has been relieved for them.

Mr. Carson said the applicable statute uses the word "benefit." Summary judgment motions raised by the opponents interpret this to mean special benefit, which requires a special benefit study prior to an assessment. Mr. Carson said the appellants disagree with this analysis based on the difference between LIDs and latecomer assessments. In the case of LIDs, an immediate increase in value occurs and therefore the assessment is immediate. In the case of latecomers assessments, the assessment is not imposed until development occurs and the property owner is relieved of the obligation to provide roadway improvements. With LIDs, there is no need to be adjacent to the improvement. However, there is a need to be adjacent to the improvements under latecomers agreements. Mr. Carson said the word "benefit" in the statute means advantage, which is the ordinary meaning for the word.

Moving to more rules of law to provide interpretation, Mr. Carson said the term "special benefit" is used in many other statutes but was deliberately not used by the legislature in the law regarding latecomers assessments. The statute addresses establishing the assessment area based on those properties that would require similar improvements. Mr. Carson said the statute is focused on relieving property owners of an obligation or requirement and is not about increases in property values. He said the legislative history does not mention special benefits but refers to utility latecomer assessments as a model. Assessments are based on road frontage lineal footage because it represents improvements property owners would have had to make if they developed their properties. Mr. Carson reiterated that the legal provisions are not based on property values.

Mr. Carson introduced Barbara Yarrington, representing Gold Creek Homes, the developer. Ms. Yarrington said Gold Creek Homes completed the roadway improvements as a requirement for the City. She explained that when Gold Creek submits a plat application, a hearing is held and the City outlines its code and other requirements. One of the requirements is frontage

improvements. Frontage improvements are not distinguished between lot yield and frontage. Ms. Yarrington noted the other parties' mention of special benefits and the need for a square footage analysis and value assessment. She said frontage improvements are based on the lineal footage along the roadway. Ms. Yarrington said the affected property owners have been relieved of their obligation to provide roadway improvements should they decide to develop their properties.

Ms. Yarrington said almost all of the affected properties have pending development applications including those owned by Roberts, Yeakel, Sabour, Ulman, and Exsterstein. Mr. Bonebright has built a single-family home so he would not owe the assessment. Mr. Lyon has a single-family house and will not owe anything unless he develops. Mr. Corry's parcel is too small to develop unless he combined with another property. The only property owners that will owe money are those seeking to develop. Ms. Yarrington said the City Code would require the property owners to provide frontage improvements as part of their developments. Gold Creek Homes is asking the developers for payment because the frontage improvements have already been completed.

Ms. Yarrington opined that property owners might argue the assessment will lower the value of their properties. She said this type of argument is misleading. If Gold Creek had not built the road, the developer of each property would have been required to build the roadway themselves and they would have adjusted the purchase price accordingly.

City Clerk Myrna Basich noted the appellants have three minutes remaining.

Mr. Carson said there is no need for the delay factor, the cost factor, or to go back for a special benefit analysis. A problem he sees is a rush to development approval. If development applications are approved and development is in progress before the latecomers agreement is approved, it might be too late to assess the property owners for the latecomers reimbursement. Mr. Carson said the property owners/developers are trying to avoid the assessment, which he feels is unfair.

Ms. Basich noted the appellants have two minutes remaining for rebuttal.

Deputy Mayor Degginger asked Mr. Carson if he feels there is no difference between the use of the word "benefit" in RCW Sections 35.72.030 and 24.02.150. Mr. Carson said the statute for utility latecomers agreements, 35.91, did not use the word "benefit" but it does use the word "assessment." He noted that no one has alleged this statute actually refers to "special benefits." Mr. Carson contends that the same logic and requirements apply under the road latecomers statute. "Benefit" is used but there is not requirement for special benefits. Therefore, provisions for road latecomers should not require a special benefits study. In response to Mr. Degginger, Mr. Carson referenced sections 35.91.02, which states that any owner of real estate who did not contribute to the original cost of the water and sewer and subsequently used the facilities should be assessed a fair pro rata share. Mr. Carson said 35.91.050 similarly addresses assessments against owners of real estate using water and sewage infrastructure. The section includes language about assessments but does not use the word "benefit."

Responding to Mr. Noble, Mr. Carson maintained that lineal footage is the fair and logical method for determining assessments in this situation. However, there may be other ways to address items such as a traffic signal, for example.

Mr. Noble referenced documents supplied by Foster Pepper & Shefelman arguing in favor of the Hearing Examiner's position. The letter states on page 2 that, "No consideration was given as to whether those impacts would be significant enough to legally warrant improvement of frontage upon development." Mr. Noble said this refers to traffic impacts and suggests that at the time of development, an analysis would be conducted to determine whether traffic impacts exist and whether frontage improvements would be required. He opined that under Mr. Carson's reasoning, this analysis would be unnecessary.

Mr. Carson disagreed with Mr. Noble's conclusion about his reasoning but agreed with the statement as read from the letter. Mr. Carson emphasized that the statute reads: "if similar improvements would have been required." He noted the example of a subdivision fronting two different roads but not taking any access. He feels the City would look at that and determine there is no way to require the developer to install frontage improvements, therefore there is no assessment. Mr. Carson said the first step is – Would they have been required to build frontage improvements? If the answer is no, there is no assessment. If the answer is yes, then the assessment should be applied based on what the City Code would have required.

Respondent's Argument:

Marsha Martin, Foster Pepper & Shefelman, representing CamWest Development noted Mr. Carson asked that her attachments be stricken. She clarified that the two attachments are legal references and not new facts being introduced, similar to the ordinances Mr. Carson has presented to support his legal argument. They support CamWest's legal argument that the latecomers assessments represent special assessments subject to the special benefit requirement. Ms. Martin asked to be informed when she has four minutes remaining.

Ms. Martin said she is here on behalf of CamWest to testify in support of the Hearing Examiner's recommendation that a special benefit study is necessary to legally determine the extent the properties in the proposed reimbursement area are benefited from this road improvement. CamWest believes a study is essential to implement the requirements of the Bellevue City Code, the applicable statute (RCW 35.72), and the state constitution. Ms. Martin said Gold Creek makes an interesting argument that the statute does not use the word "benefit." The statute specifies that assessments must be based on benefit to property. Ms. Martin acknowledged the word "special" is not used. However, this does not relieve the obligation to perform a special benefit study. Ms. Martin said Gold Creek argues that the benefit is being relieved of having to provide frontage improvements with future development. She and CamWest disagree. She said Gold Creek's argument disregards the statute language as well as constitutional limitations on special assessment.

Ms. Martin said frontage improvements are not absolute in Bellevue. The City requires them if there is a sufficient and direct impact. Case law, the constitution, and Bellevue practice make it clear that frontage and other improvements cannot and will not be required unless a development

has an impact necessitating improvement.

Ms. Martin said the word “benefit” as used in RCW 35.72.030 is synonymous with a special benefit. A latecomers assessment is like an LID in that the statutes use the word “special” to indicate a special assessment as opposed to a general tax. The assessment method must be based on benefit to property as required by Article 7, Section 9, of the state constitution. The constitution does not use the word “special” but there are only two kinds of benefit when dealing with assessments and taxes – special benefits and general benefits.

Ms. Martin said University of Washington law school professor Phillip Trautman wrote an article years ago titled “Assessments in Washington.” He addressed the critical difference between general and special benefits in distinguishing taxation from local assessment. This distinction is well stated in an early case, “The theory upon which general taxation proceeds is entirely distinct from that of local assessments. General taxation is sought to be enforced against all classes of property on an ad valorem basis while local assessments are limited to real property within a given district and are based upon the serious special benefit by which the value of property is enhanced in excess of the general good.” An early Washington State Supreme Court case held, “It is the basic principle and the very life of the doctrine of special assessments that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed. To assess property for a thing which did not benefit it would be pro tanto the taking of private property for a public use without compensation, hence unconstitutional.”

Ms. Martin said Gold Creek wants to apportion costs but it does not want to base the apportionment on special benefit. The State Supreme Court in *Bellevue Plaza v. Bellevue* (1995) addressed this rationale and struck down assessments based on a method that did not reflect benefit to the properties assessed. The court stated, “Any formula must ultimately relate to benefits, not merely the distribution of costs.” Ms. Martin suggested Gold Creek should not base assessments on cost, but rather on the difference in the fair market value of the properties before and after the road improvements. The critical consideration is whether the method of distributing costs properly represents benefits to the properties assessed.

Ms. Martin referred to Attachment 6 and said Mr. Carson acknowledged that the special benefit concept applies. She said he specifically cited RCW 35.72.030 and stated, “It is a special benefit to each property owner that must be looked at in relationship to the assessment.” Ms. Martin agreed and noted this is what the Hearing Examiner has ordered. She said an expert appraiser will testify tonight and respectfully requested that Council approve the Hearing Examiner’s recommendation.

Ms. Basich noted 10 minutes and 40 seconds remaining.

Responding to Deputy Mayor Degginger, Ms. Martin said *Bellevue Plaza v. Bellevue* was a LID assessment case. She said the latecomers statute is relatively new and there is only one case under the law, but the concepts have been addressed in many other contexts.

Mr. Noble asked whether Ms. Martin and CamWest feel that the only appropriate method of determining assessment levels is by conducting a benefit analysis. Ms. Martin said the appraiser

will address that question later. She noted that a special benefit sets the maximum amount of the assessment. The statute states that any method used must be based on benefit. Ms. Martin said the front footage method is inappropriate in this case in which the properties have different zoning and development potential. She feels other methods are available that would better meet the statutory and constitutional benefit requirement. A special benefit analysis would set maximums on assessment levels.

In further response to Mr. Noble, Ms. Martin said a number of methods could be used to determine costs. However, the maximum limitation on assessments should be based on a special benefit, or the incremental increase in market value attributable to the improvement. Ms. Martin said the record reflects CamWest's opinion that the lineal footage method is never appropriate in cases with diverse zoning and development potential. The lineal footage method is more appropriate in a subdivision in which all of the lots have the same zoning and approximately the same frontage, and therefore benefit can be approximated. In this case, Gold Creek's assessments are not based on benefit.

Mr. Noble noted the Hearing Examiner's application of the LID special benefit analysis to the latecomer assessment issue. He questioned whether it would affect Ms. Martin's argument if it is determined that the LID analysis is not an appropriate analogy. Ms. Martin answered in the affirmative and said the other party's argument is circular. The statute dictates a pro rata distribution of costs and that this must be done using a method based on benefit. She said there must be some way of apportioning benefit in a fair and equitable manner. Gold Creek argues that property owners have been potentially relieved of an obligation to provide frontage improvements. Ms. Martin said that obligation might never surface or it could surface with partial impacts necessitating partial frontage improvements.

Ms. Martin feels the latecomer assessments represent a special assessment as defined by the state constitution. The constitution requires that special assessments must be based on benefit. Ms. Martin questioned why anyone would use the term "benefit" because in a latecomers situation, properties requiring frontage improvements must automatically be included. The constitution never uses the term "special." Ms. Martin said no one disagrees that LID assessments stem from a requirement of the constitution that they be based on benefit. However, the constitution does not use the term "benefit." This case represents a special assessment on particular properties and a special benefit must be demonstrated. Otherwise the parties are being unlawfully taxed, in violation of the state constitution.

Responding to Deputy Mayor Degginger, Ms. Martin said Mr. Carson is incorrect to say that this matter represents a disagreement between two sets of developers. Mr. Degginger asked whether Ms. Martin's clients would have been required to provide frontage improvements if the road had not already been built. Ms. Martin said the improvements would not have been required because there is already a property stub to the west that was intended to access these properties. She said her client's plat is being designed to not take access from the road provided by Gold Creek. In addition, the client's property now has retaining walls around it as a result of the road development, which makes access to the property impossible from the road.

Mr. Lee questioned how Ms. Martin would determine benefits. He asked whether a method is available that would be agreeable to all parties. Ms. Martin said the benefit would be based on property appraisals before and after the road improvement was completed. She acknowledged the potential for a difference of opinion among experts, however.

Paul Bird introduced himself as an employee of Macaulay & Associates, a real estate consulting firm. He has appraised real estate since 1987 and worked on special benefit studies since 1992. In 1999, Mr. Bird prepared a latecomer special benefit analysis for the City of Arlington under nearly identical circumstances as this case.

Mr. Bird said RCW 35.72 states that reimbursement for road improvement projects shall be based on a pro rata share of the costs. The municipality must determine the reimbursement amount using a method of cost apportionment based on the benefit to the property owner from such project. In appraisal practice, there are two types of benefit – general and special. A general benefit stems from a project such as road, park, or other improvements that benefit the whole community and where value enhancement is incremental and cannot be reasonably and accurately measured. A special benefit is a direct and measurable benefit to properties that occurs as the result of a project, and the measure of the benefit is the increase in market value attributable to the project. Special benefit is inherent in RCW 35.72. In a typical benefit analysis, the market value of each property is measured twice – first assuming there is no project and again assuming the project is completed – and is based on the highest and best use under both scenarios. The highest and best use is that which is legally permissible, physically possible, economically viable, and brings the highest return to the land. The date of valuation is the same under both scenarios, and the difference in market values is the special benefit.

Mr. Bird said different cost allocation methods may be used to apportion costs in different circumstances. However, the cost assessment can never exceed the benefit to the property. Examples of cost allocation methods include zone and termini, front footage, land area, dwelling units, and others. The front footage method is acceptable in limited situations in which properties have similar size, shape, front footage length, and soils, which is not the case here. Mr. Bird said the front footage method used by Gold Creek is fundamentally flawed because the properties have vastly different zoning, shapes, sizes, lengths, traffic impacts, and development potential. This method bears no relation to the properties' benefits received by the new road, and no special benefit analysis has been completed.

Mr. Bird said one example of this flawed method is the Roberts and Yeakel properties. They are next to each other; similar in size; and have the same zoning, traffic impacts, and development potential. However, the Roberts assessment is more than eight times the Yeakel assessment. Another example is Roberts and Bonebright.

Continuing, Mr. Bird said Bonebright has four times the development potential of Roberts, yet the Bonebright assessment is lower than the Roberts assessment. CamWest submitted a preliminary design for the Sabour/Hosseini, Ulman, and Exsterstein properties for a subdivision taking access from the west and not from 166th Way. The backyards of the lots face 166th Way and all sit below grade, some up to eight feet below grade. Given these examples, the true benefit to these properties can only be determined by a special benefit analysis.

Eric Campbell, CamWest Development, said his project will not take direct access from 166th Way. They are opposed to the assessments because the frontage improvements provide no benefit to them or their project. Mr. Campbell referenced Attachment 1 of Ms. Martin's exhibit and noted CamWest was the developer of Cougar Ridge to the west along SE 66th Street. CamWest was never informed that Gold Creek planned to seek assessments. Mr. Campbell noted a previous CamWest project called Winfield fronting 164th with no direct access and no frontage improvements required. He said if anything, the 166th Way road improvements have lowered the value of properties because of the difference in grade between the road and the properties.

Responding to Mr. Noble, Mr. Campbell said his project will not have any access to 166th Way.

Mr. Lee questioned the difference in grade between the road and surrounding land. Mr. Campbell said the developer designed the road to meet site-specific conditions that required a raised roadway.

Rod Bonebright asked to be stopped after three minutes. He disagrees with both methods of apportionment and feels neither will work. He received permits to build his house before Gold Creek development permits were issued. He now has a house on his property, has removed trees, and brought in fill. He had to build an elevated driveway to gain access to his property because Gold Creek raised the road by five feet.

Mr. Bonebright said the value of his property decreased as a result of the road. He has no confidence this reality will be reflected in an appraisal. He complained to the City of Bellevue when he learned the road would be raised, and the City told him it was too late to complain. Elevating the roadway was Gold Creek's idea. Mr. Bonebright said they raised the road because it made it easier to build the detention ponds. He said the argument that he is being relieved of expenses to build a road is false. It would have been easier and less expensive to build the road when the property was flat, as it was when he initially purchased the land. The road was expensive due to the retaining walls and efforts to repair riparian corridors.

Mr. Bonebright said he paid a high dollar amount per acre for his property because it was easy to develop at that time. Gold Creek paid a low dollar per acre because it was difficult to develop. Mr. Bonebright said he is being asked to share their costs for roadway construction. Gold Creek paid less for their land and is now asking him to contribute toward their development costs. Mr. Bonebright said Gold Creek developed its project and the road with no expectations of reimbursement. Gold Creek later contacted the City and was able to get an ordinance passed allowing latecomers assessments. He was given no choice in the construction of the road. Mr. Bonebright said his property value has decreased because he has lost a construction lot, which he values at more than \$200,000, as a result of the road built by Gold Creek. He would have rather paid \$50,000 for nothing than the road that was built.

➡ Deputy Mayor Degginger moved to extend the meeting to 10:30 p.m., and Mr. Noble seconded the motion.

➡ The motion to extend the meeting to 10:30 p.m. carried by a vote of 6-0.

Mr. Bonebright said if road reimbursement contracts are to be used, there should be a requirement that expected costs are included with the contract. This would have given him the opportunity to provide input into the road design and construction. Mr. Bonebright has built a single-family home on his property. He said it would be impossible to develop the site up to the potential indicated by the other party. He said the road built benefits Gold Creek's property and not his.

Ms. Basich indicated 1 minute and 36 seconds remaining.

Mr. Bonebright said this situation is not comparable to utility improvements. If a water line is installed, the cost can be equitably distributed between property owners. He feels this road does not make sense. His property was flat and easy to build while the Gold Creek development was more difficult and expensive with numerous retaining walls. Mr. Bonebright said he is being asked to pay for a portion of a difficult road up the street that he would have never been required to build. With Cougar Ridge East, Mr. Bonebright said he is being asked to pay \$50,000 to build a road that has damaged his property value. If he had the choice, he would have been better off paying \$50,000 to Gold Creek to not build anything. To avoid building a ramp driveway from the road to his house, he built a meandering driveway that is 150 feet longer. This took up so much of his property that he no longer has the potential to develop another construction site.

Ms. Basich informed Mr. Bonebright that he had used all of his time to speak. Mayor Marshall said the appellant will have two minutes for rebuttal.

Rebuttal:

Mr. Carson said this is not a government special assessment, but rather a contract, a latecomers agreement, imposing a fee. He read from the legislative history (Page 327 of the Record), "This statute authorizes local governments to provide for the partial reimbursement to the owners of property who paid for mandatory street improvements by imposing a fee on subsequent owners for whose property no payments were made." Mr. Carson said it is a fee, not a tax or a special assessment. Laws governing LIDs and special assessments are irrelevant to latecomers assessments.

Mr. Carson said road latecomers assessments are similar to utility latecomer assessments. If property owners tap into a water line or a roadway, they should pay for it. And the cost should be based on the benefit of not having to build the frontage improvement.

Mr. Carson said the individuals do not have to pay if they do not connect to the road as determined by the City. He noted page 93, paragraph 1.2 of the proposed contract, which states, "The exception from payment from this reimbursement assessment is if the owner of the benefited property can establish to the satisfaction of the City that the benefited property would not have been required to construct that portion of the eligible improvements across the frontage." If CamWest is not planning to take access from 166th Way, Mr. Carson assumes there would be no obligation to pay upon development. He said this is not an assessment because it is not due now. Payment is due only if and when a property owner develops, and if the City determines an obligation to provide frontage improvements.

Mayor Marshall noted that the time for arguments has expired.

Responding to Mr. Noble, Mr. Carson said his argument against Ms. Martin's constitutional argument is that latecomers assessments are not a tax or assessment as contemplated by the constitution. Latecomers assessments represent a contract fee reimbursement.

Mr. Lee questioned Mr. Carson's use of the term "mandatory improvements." Mr. Carson said the City Code (14.60.110) states that the installation of street frontage improvements is required prior to the issuance of a certificate of occupancy for new construction of a single-family homes. However, if there is no connection to the street and a property owner is taking access another way, the question remains as to whether the City can impose a frontage improvement. Mr. Carson said even if CamWest is not planning vehicle access to 166th Way, the City could require pedestrian facilities or other improvements.

Mr. Noble asked Mr. Carson to elaborate on his last statement. Mr. Carson said the City would have to reexamine in that situation. Statute and City Code state that a recorded amount must be documented now. What should the assessments be based on? It is based on some amount from everybody. If no property owner ever develops, the contract expires after 15 years. If someone develops and takes access, the amount has already been determined. If the City determines that a developing property owner has no obligation to provide improvements, then the assessment would not be paid. Mr. Carson said it is possible the City could require a portion of the improvements, which would likely require a reevaluation at that point. He said it is impossible at this time to know what improvements might be required of any property owner.

Responding to Mr. Lee, Mr. Bonebright said he must use 166th Way to access his property.

- Mr. Mosher moved to close the limited public hearing, and Mr. Noble seconded the motion.
- The motion to close the limited public hearing carried by a vote of 6-0.

Mayor Marshall reviewed the four alternatives before Council: 1) approve the Hearing Examiner's recommendation and remand the question of the assessment methodology to the Transportation Department for a determination of new assessments through a special benefits analysis, 2) modify the Hearing Examiner's recommendation and remand the question of the assessment methodology to the Transportation Department for a determination of new assessments based on another method of apportionment, 3) reject the Hearing Examiner's recommendation and return the matter to the Hearing Examiner with direction to proceed using the front footage assessment methodology as proposed by the Transportation Department, and 4) continue the matter for staff to provide additional information for analysis and make a decision at a subsequent Council meeting.

- Mr. Mosher moved to reject the Hearing Examiner's recommendation and return the matter to the Hearing Examiner with direction to proceed using the front footage assessment methodology as proposed by the Transportation Department. Dr. Davidson

seconded the motion.

Mr. Lee feels an objective and reliable method of determining assessment levels should be used. He noted the difference of opinion and ability to debate any assessment method, due in part to the assumptions made. He feels the front footage method is easier and more straightforward than other methods. Mr. Lee is sympathetic to Mr. Bonebright's situation in which the roadway was built above the level of his property. Mr. Lee would like provisions to be made for residents adversely affected by the roadway.

Mr. Mosher said he is thinking in terms of a situation in which the City had built a road and wanted to collect assessments. He feels such assessments would be based on the front footage method. Mr. Mosher said it would be inappropriate to change the assessment methodology in the case before Council. He supports the front footage method as fair and straightforward.

Deputy Mayor Degginger offered a substitute motion to continue the matter, which did not receive a second.

Mr. Noble opined that the fundamental issue before Council is whether the Hearing Examiner properly interpreted the term "benefit" as used in City Code and state law. The Hearing Examiner determined that "benefit" in the latecomer statute means the same thing as "special benefit" for LID purposes and that the roadway should be handled as an LID. Mr. Noble disagrees with that conclusion. His review of the statute and case law does not support the analogy to LIDs. Mr. Noble referenced WSBA Real Property Deskbook, 3rd Edition, Section 82.2, which states that the theory underlying the local improvement district assessment process is simply that the improvements installed will increase the fair market value of the property within a local improvement district and, accordingly, it is appropriate for the municipality to assess that property to recover the cost of installing those improvements. In the case of 166th Way, the road was not installed with the purpose of increasing the market value of adjacent properties. As a result, the comparison to an LID is inappropriate. Mr. Noble acknowledged that the front footage method is probably the easiest approach but he said that does not mean it is the most appropriate method.

Responding to Mr. Noble, Ms. Dreaney said staff's role has been that of a facilitator for the process. Staff has taken no position regarding any assessment method. City staff evaluated the proposal submitted by Gold Creek and determined that the costs incurred were reasonable, but staff did not examine other assessment methods.

- ➡ As a substitute motion, Mr. Noble moved to modify the Hearing Examiner's recommendation and to remand the question of the assessment methodology to the Transportation Department for a determination of new assessments based on another method of apportionment. Mayor Marshall seconded the motion.

Responding to Dr. Davidson, Ms. Dreaney confirmed that 166th Way existed before the Gold Creek project. Dr. Davidson noted the roadway was improved by Gold Creek to meet the needs of its development project. He expressed support for Mr. Mosher's motion because the City utilizes the front footage methodology.

- ➡ Deputy Mayor Degginger moved to extend the meeting to 11:00 p.m., and Mr. Lee seconded the motion.

- ➡ The motion to extend the meeting to 11:00 p.m. carried by a vote of 6-0.

Mr. Lee feels the road improvements by Gold Creek were unreasonable based on the adverse impacts on adjacent properties. He suggested that staff develop an estimate for the cost of mitigating the problems now faced by neighbors along the road. Mr. Andrews said this issue will be addressed by the Hearing Examiner when a subsequent hearing is held on the merits of the proposal. The assessment contract must include costs that would have been imposed upon subsequent developers of property. If costs included in the frontage development were solely for the benefit of Gold Creek Homes, the Hearing Examiner would have the discretion to exclude those costs from the assessment contract. Mr. Andrews said this issue will ultimately be addressed by the Hearing Examiner and Council.

Mr. Mosher expressed support for the substitute motion. He is interested in resolving the matter without a great deal of delay.

Mayor Marshall questioned whether the City assesses property owners for road improvements when the property owners do not have direct access to a road but happen to be located adjacent to it. Ms. Dreaney said the City has not had a LID assessment in quite a while. Road projects are generally completed through the Capital Investment Program and assessments are not imposed. Ms. Dreaney said it would be difficult for the City to require frontage improvements if a property does not have access to the road.

- ➔ Mayor Marshall offered a friendly amendment to the substitute motion to direct staff to study a range of assessment methodologies with consideration given to whether a property owner has direct access to the road. Mr. Noble accepted the amendment.
- ➡ The substitute motion to modify the Hearing Examiner's recommendation and to remand the question of the assessment methodology to the Transportation Department for a determination of new assessments based on another method of apportionment, taking into consideration whether or not a property owner has direct access to the road, carried by a vote of 6-0.

10. Land Use: None.

11. Other Ordinances, Resolutions and Motions

- (a) Resolution No. 6826 approving the 2003 ARCH (A Regional Coalition for Housing) administrative budget and work program.

- ➡ Mr. Noble moved to approve Resolution No. 6826, and Mr. Mosher seconded the motion.

- ➡ The motion to approve Resolution No. 6826 carried by a vote of 6-0.

12. Unfinished Business: None.
13. Continued Oral Communications: None.
14. New business: None.
15. Executive Session: None.
16. Adjournment

At 10:36 p.m., Mayor Marshall declared the meeting adjourned.

Myrna L. Basich
City Clerk

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